Restoring the Validity of Law in Democratic Societies

Roberto Gargarella 2022-01-04T14:14:19

The questions posed by Professors Andrew Arato and András Sajó in their open letter *Restoring Constitutionalism* are pressing and of utmost public importance. I want to thank them, both for posing those questions to us, and also for their generous invitation to answer those queries. In this blog post, I will briefly address, or attempt to address, a few of them. In particular, I shall try to say something concerning question one (about constitutions that are manifestly "incompatible" with the "principles of the rule of law"), three (about the constitutions "created under procedures that did not correspond to the formal amendment requirements in place"), four (about the approval of constitutional projects through referenda), and six (about the requisites of "public discussion and participation" in the Constituent Assembly). According to the open letter, many of these issues and controversies arise after "democratic backsliding has taken place" and when the Constitution already includes "entrenched authoritarian enclaves". Taking this context into consideration, I will examine a more basic issue, namely the validity of law in a democratic society. By addressing this issue, I assume, I will be in better condition to reflect about the above-mentioned questions.

Three Preliminary Considerations

Before exploring the issue of the validity of law, let me briefly refer to some preliminary and controversial issues that, unfortunately, I will not be able to examine in more detail later. My first assumption is the following: when thinking about how to "restore constitutionalism", we should not confuse "constitutionalism" with the text of a Constitution. Perhaps, we can „restore constitutionalism" without the need to write or amend (without the need to touch) the Constitution. Secondly, we should avoid the risk of „fetishizing" the Constitution, or of implicitly assuming that it has „magical powers" to transform reality (the great Argentine constitutionalist Juan B. Alberdi spoke of „a Constitution that had the power of the fairies, who built palaces in a single night „). Perhaps, after enormous political and social efforts, we manage to approve a new Constitution whose application is systematically blocked by those in power (including executive and administrative authorities, magistrates in charge of interpreting the Constitution, etc.). In other words, it may well happen that we manage to change the Constitution, but not our public life. Third, I understand that, as recent political practice has shown us (i.e., the practice of the new „citizen assemblies"), our legal structures/ institutions can undergo significant changes without the need to resort to a constitutional reform. Having raised these preliminary points, I now turn to the main theme of my post.

About the validity of law

If we have a moral and legal obligation to obey the laws of a democratic country, that obligation does not derive from fear or force.[1)]Additionally, we should not confuse the validity of the law with its occasional legitimacy (say, the social support that this law can gather at a given time). The fact that certain norms are occasionally backed by the coercive powers of the state does not provide, *per se*, a justification for those norms – it does not give us reasons to confer authority on them (i.e., in a dictatorship we may obey the laws out of fear, and after its end we can keep them, for prudential reasons, but that does not mean that those laws are valid). In a democracy – I submit – we owe obedience to the law when (*if and only if*) the law is *valid,* this is to say, when the law is duly justified. Clearly, the validity of these laws depends on satisfying certain basic conditions. So, the question is: what are the conditions that would allow us to speak of a valid law? Undoubtedly, the issue is controversial, but I think we can still advance some reflections about this issue. In my view, to think „realistically" about the validity of the law we must neither be over-demanding (say, assume that the law is valid only after some almost unattainable goals are achieved, i.e., an unanimous and informed agreement), nor assume that „anything goes" in terms of legal validity (i.e., the law is valid because people are afraid of disobeying it). Personally, I tend to assume that the validity of the law is not an „all or nothing" quality, but rather a „gradual" quality: validity is -for this view- *a matter of degree*. Let me be more specific. The idea would be this: the law enjoys a *presumption of validity* when it satisfies certain basic democratic conditions, and particularly two of them (two procedural conditions), namely *social inclusion* and *public discussion*. To put it differently: when the majority of society is -in fact- excluded from the decision-making process, or when the law is the mere result of interest-group pressure (rather than public debate), then the validity of the law results substantially undermined.

Two examples of invalid laws, and what to do about them: Chile 1980, Argentina 1983

If I had to offer an example of an invalid law (and, for the purpose of this text, and invalid Constitution), I would mention, precisely, one of the examples that appears in Arato and Sajó's letter: Chile's 1980 Constitution. This Constitution was drafted during Augusto Pinochet's dictatorship, by the so-called "Ortúzar Commission". The Commission was created on 26 September 1973 (just a few days after the coup that overthrew President Salvador Allende) and was composed of by very few people, including its president, Enrique Ortúzar, Alejandro Silva Bascuñán, Jorge Alessandri, Alicia Romo, Juan de Dios Carmona, Sergio Diez and the influential conservative jurist Jaime Guzmán, among others. At the time, and trying to explain the rationale of the Constitution, Guzmán asserted: "The Constitution must ensure that if [our] adversaries come to rule, they are constrained to follow an action not so different from what one would yearn for, [so that] the range of [available alternatives become] sufficiently reduced"[2)]Guzmán, J. (1979), "El camino político", *Revista Realidad,* Año 1, 7, Instituto de Estudios para una Sociedad Libre, 13-23.. The Constitution was approved through a very controversial plebiscite that was held on

11 September 1980, with 67% of the votes. The legitimacy of this act was severely questioned, given that political parties were then prohibited, freedom of expression was inexistent, basic political rights were limited, and political opponents were persecuted and imprisoned. In my terms, the Constitution was drafted in conditions of total social exclusion and an absolute lack of public debate. For those very reasons, it should have been considered a completely invalid Constitution. However, as we know, it is only today (begin of 2022) that the Constitution is about to be changed, after an extremely difficult, long, and painful process.

Another, more interesting example of an invalid law (and, in this case, an invalid law that was then nullified) relates to the Self-Amnesty law that was passed by the *Military Junta,* in Argentina. The Law 22934, or "Self-Amnesty Law," was proclaimed by the Government of the dictator General Bignone on 23 September 1983, a few weeks before the instauration of the new democratic government that would be led by President Raúl Alfonsín. The law was implemented with the explicit objective of "pacifying the country" and ensuring "social reconciliation," going so far as pardoning both the people directly responsible for and anyone who had collaborated with those individuals in any "subversive or anti-subversive" acts committed between May 1973 and June 1982. The conditions under which this amnesty law was promulgated were of course characterized by maximal restrictions on political and civil liberties and the absence of institutions that might express or be held accountable to the will of the people.

At the time, different legal scholars assumed that the Self-Amnesty law was unacceptable but found it very problematic to justify its legal invalidation.[3)]This, among other reasons, because of the combination of art. 2 of Argentina's Penal Code – stating that the judge must apply the law more beneficial to the defendant- and article 18 of the Constitution -about the non-retroactivity principle- seemed to prevent that possibility. In the end, however, the newly established democratic Congress managed to nullify that Self-Amnesty law through Law 23040 (remarkably, this law was the first statute of the new constitutional period). Notably, the main arguments in favor of this Law were offered by jurist Carlos Nino – a strong advocate of deliberative democracy – who stated that, given the obnoxious (procedural) conditions under which laws were created during the military government, those *de facto* laws could not be deemed, in principle, valid law. He claimed: "statutes enacted by a *de facto* government have only a precarious validity".[4)]Nino, C. (1985), "The Human Rights Policy of the Argentine Constitutional Government: A Reply," Yale Journal of International Law, vol. 11:217. Nino developed and expanded his view in a book that he dedicated to the matter of the validity of law, see Nino, C. (1985), La validez del derecho, Buenos Aires: Astrea. For Nino, the validity of the norms was favored and reinforced by discussion processes such as those that characterize a democratic system. The process of creating the law thus appeared connected with the normative force of its content.

The “Conversation Among Equals”: A Few Additional Implications

In the previous paragraphs, and in a very sketchy way, I referred to some of the features that could characterize a democratic law. Basically, I said that a law enjoyed a presumption of validity when it was the result of an inclusive process of public debate. Consequently, the more such conditions are satisfied, the greater must be the presumption of the validity of the law. Let me now use this approach -related to what I call “a conversation among equals”- in order to propose two quick final points (Gargarella 2022).

First, this view has some suggestions to offer concerning the process of drafting a democratic constitution. Such a process should – as much as possible – incorporate the viewpoints of “all those potentially affected”. The composition of the Constituent Assembly and the procedures that organize its work would then become key elements for ensuring the drafting of a valid Constitution. For instance, Chile’s current Constitutional Assembly (the one that will finally put an end to the dominance of the 1980 Constitution) seems to be oriented in the right direction. This seems to be the case (*prima facie*, at least) when we pay attention to the way in which the Assembly has been integrated and we examine the initial drafts of its procedural rules (i.e., the Assembly is distinguished by an unprecedented gender parity, the collective representation of indigenous peoples, etc.).

Second, the suggested approach also says something (negative) regarding the use of popular referenda in constitution-making processes (and regarding the use of popular referenda, in general). Given the weak and very limited expressive capacities of the suffrage, the use of referenda may represent a bad idea, particularly with regard to long, complex and contradictory documents such as a constitution. Such popular consultations tend to aggravate what I call the problem of “electoral extortion” . Let me illustrate this problem with the example of the 2004 Bolivian Constitution. After the draft of a new Constitution had been completed, the country’s president, Evo Morales, submitted it to a popular ratification process. That Constitution is composed of 411 articles and hundreds of subsections. Facing the consultation, millions of voters were attracted, say, to the clauses related to social and economic rights for indigenous communities, but at the same time repulsed by the powers that the Constitution granted the President and the terms for re-election. Considering *only* those two elements (presidential reelection + indigenous rights) of the constitution’s ocean of articles and clauses, the dimension of the problem (the “electoral extortion”) is obvious. Not only are people prevented from asking for some revision or additional nuance, they are forced *to pronounce themselves in favor of proposals they absolutely reject (say, reelection) in order to obtain the promises that they value even more (say, indigenous rights)*. In this sense, popular consultations worsen the citizens’ connection to the constitution. Now, not only will they have to put up with constitutional regulations that they emphatically repudiate, but their vote for the constitution will be interpreted as approval of those abhorrent elements. Voters will have no way of clarifying the error, no way of marking their reservations regarding specific parts of the text.

References

- Additionally, we should not confuse the validity of the law with its occasional legitimacy (say, the social support that this law can gather at a given time).
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